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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1459

UNITED STATES OF AMERICA,
Petitioner,

versus

LITTLE LAKE MISERE LAND COMPANY, INC., ET AL.,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS, LITTLE LAKE MISERE LAND COMPANY, INC., ET AL.

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BRIEF OF RESPONDENTS, LITTLE LAKE MISERE LAND COMPANY, INC., ET AL

QUESTIONS PRESENTED

The issues in this case may be narrowed and sharpened by a consideration of the following questions in addition to those suggested by the United States:

(1) Whether the question of the application of Louisiana Act 315 of 1940 to the reserved mineral rights involved in this case has been settled affirmatively by the prior decision of this Court in *Leiter Minerals, Inc.*

v. United States, 352 U.S. 220 (1957) and the subsequent advisory opinion of the Louisiana Supreme Court in *Leiter Minerals, Inc. v. California Company*, 241 La. 915, 132 So.2d 845 (1961), leaving for determination by this Court only the question of the constitutionality of the State statute as so construed and applied?

(2) Whether the Migratory Bird Conservation Act[1] can be invoked by the United States to override the law of Louisiana, where Congress in that Act not only refused to assert exclusive Federal jurisdiction, but, to the contrary, expressly reserved the State's jurisdiction over the properties acquired by the United States?

SUMMARY OF ARGUMENT

The decision of this Court in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) specifically demands that the law of Louisiana, in particular Act 315 of 1940, be applied in the resolution of this case. The Government's argument that federal law must be applied would lead to the emasculation of the *Leiter* decision. Even aside from *Leiter*, there are numerous authorities demanding application of state law in isolated acquisitions of land such as are involved here.

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[1]Act of February 18, 1929, 45 Stat. 1222, 16 U.S.C. 715 et seq., (Supp. 1972) (*infra*, pp. 2a-4a).

Under state law, clearly controlling here, the mineral reservations involve servitudes of uncertain and indefinite duration, and therefore present cases of contractual prescription. The advisory opinion of the Louisiana Supreme Court in *Leiter Minerals, Inc. v. California Company,* 241 La. 915, 132 So.2d 845 (1961) is direct authority that under state law, Act 315 can constitutionally be applied to render imprescriptible the mineral rights of respondents.

Finally, the reversionary right to the minerals possessed by the United States is a mere hope and not a vested property interest, and cannot serve as a basis for the constitutional issues raised untimely by the United States.

ARGUMENT

I.

State Law Rather Than Federal Law Must Be Applied In Determining The Government's Present Claim To The Mineral Rights In These Properties.

Pretermitting at this point the constitutional questions raised by the United States, the initial issue is whether in connection with these two isolated acquisitions of Louisiana real property by the Government, federal law or the law of Louisiana is controlling. The United States argues that federal law must be applied, which in effect is a contention that this Court should ignore Act 315 of 1940 and the interpretation of that statute made by the Supreme Court of Louisiana.

The end result of upholding the Government's arguments on this point would be the modification and emasculation of the prior decision of this Court in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) (herein *Supreme Court — Leiter*). A brief review of the somewhat turbulent history of the *Leiter* litigation will readily substantiate this statement.

As in the present case, the federal judicial proceedings in *Leiter* commenced with a District Court action by the Government to quiet its title to mineral rights that had been reserved from a sale to the United States. After wending its way through the District Court[2] and the Fifth Circuit Court of Appeals[3], writ of certiorari was granted by this Court which resulted in its 1957 ruling in *Supreme Court — Leiter*.[4] Squarely before the Court were the questions (1) of whether Louisiana Act 315 of 1940 should be applied and, if so applied, (2) of the proper interpretation of that statute. The Court, through Justice Frankfurter, then ruled quite explicitly that the interpretation of the 1940 Louisiana statute was a matter of State law and that, therefore, a construction of the Act should be obtained from the Louisiana Supreme Court. In so doing, this was said:

> "... The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of con-

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[2]*United States v. Leiter Minerals, Inc.*, 127 F.Supp. 439 (E.D.La. 1954).

[3]*Leiter Minerals, Inc. v. United States*, 224 F.2d 381 (5th Cir. 1955).

[4]*Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957).

> stitutionality. The District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are or may be relevant. Before attempting to answer them and to decide their relation to the issues in the case, *we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court.*" (352 U.S. at 229) (Emphasis added.)

Clearly, therefore, the present request of the Government that federal law be applied over state law irrespective of any federal constitutional questions is asking this Court to hold that it did a vain and useless thing in *Supreme Court — Leiter* in directing the remand of the case to the Louisiana Supreme Court for an interpretation of the state act. Surely the federal law would have been applied in the original *Leiter* case if, in fact, state law could not be considered.

In a prior brief,[5] the Government asserted that it is not attempting to modify *Supreme Court — Leiter* by its argument that federal law should prevail over

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[5]Reply brief of the United States on petition for writ of certiorari.

state law in the case. It justified its position by referring to the statement in the prior decision that the state court in the advisory proceeding "can decide definitively only questions of state law that are not subject to overriding federal law". (352 U.S. at 229-230.) Respondents submit that the "overriding federal law" referred to by Justice Frankfurter was the federal constitutional issue that would be presented by the application of Act 315 of 1940 to the Leiter servitude. This Court has itself so construed its decision in *Supreme Court — Leiter*. In that very opinion, this was said:

> "In fact, where questions of constitutionality are involved — and the Government contends that an application of the state statute adverse to its interests would be unconstitutional — our rule has been precisely the opposite: 'as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law.'" [Citing authorities.] (352 U.S. at 228-229.)

In subsequent decisions Leiter was interpreted only as authority for the postponement of the exercise of federal jurisdiction in cases "presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of *pertinent* state law." *County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185, 189 (1959). (Empha-

sis added.) *See also United Gas Pipe Line Company v. Ideal Cement Company*, 369 U.S. 134, 135-136 (1962). Therefore, having called for and received the advisory opinion from the highest court in Louisiana, this Court is bound to apply Act 315 of 1940 to the mineral rights reserved in the transfers to the United States; and there remains for consideration only the narrow issue of the constitutionality of the Act as so construed and applied.

Completely aside from the *Supreme Court — Leiter* decision, the rule is clear that where only specific and isolated acquisitions of real property are involved and in the absence of specific Congressional action pre-empting the field in connection with the acquisitions, state law is uniformly applied to such transactions. This is based on the fundamental and valid concept that the states possess the power to regulate the tenure of real property within their respective limits and the modes of its acquisition and transfer. *United States v. Yazell*, 382 U.S. 341 (1966); *United States v. Burnison*, 339 U.S. 87 (1950); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); *Sunderland v. United States*, 266 U.S. 226 (1924); *Mason v. United States*, 260 U.S. 545 (1923) and *United States v. Fox*, 94 U.S. (4 Otto) 315 (1877). In *United States v. Fox*, the rule was expressed in this language:

> "It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any

> other mode, is exclusively subject to the government within whose jurisdiction the property is situated. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government." (94 U.S. at 320).

The *Fox* decision was expressly reaffirmed by this Court in *United States v. Burnison*, with the Court stating, "We shall not overrule the Fox case, and, of course, we find no distinction between realty and personalty."[6]

The more recent decision of *United States v. Yazell, supra*, probably is the most direct authority on this point that can be offered. In that case, this Court ruled that in the absence of specific Congressional action, the federal court should not override state law unless compelled to do so by clear and substantial interests of the national Government; and at that point this was said:

> "The decisions of this Court do not compel or embrace the result sought by the Government. None of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract." (382 U.S. at 353.)

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[6] 339 U.S. at 93.

Wallis v. Pan American Petroleum Corporation[7] furnishes another clear example of the rule that state law rather than federal law should be applied even to the interpretation of a federal mineral lease so long as there are no overriding national interests to protect.

The Government's brief does not consider any of these decisions. Its argument that federal law must be applied here is largely buried in its discussion of the constitutional issues (page 21, et seq.); and the decisions principally relied on are *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958) and *United States v. Allegheny County*, 322 U.S. 174 (1944). Neither is apposite. *Ivanhoe*, dealing with a water contract, clearly was a situation involving a contract relating to the disposition of the Government's own property (water) produced under federal authority. *Allegheny County* involved the question of state taxation of federal property after the title to the property was acknowledged to be in the Government. These decisions and all of those relied on by the United States presented situations either (1) where the action of the Government was derived from constitutional authority, (2) where the necessity for a uniform application of a federal statute national in scope was apparent, (3) where some significant threat to the constitutional functions of the United States would otherwise be present or (4) where Congress clearly had established exclusive federal legislative jurisdiction. In the present case we are dealing only with individual acquisitions of Louisiana real property by the United States and

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[7] 384 U.S. 63 (1966).

as was said in *United States v. Yazell, supra,* "None of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract." (382 U.S. at 353).

In its argument that "Federal Law" controls and must be applied, the Government failed signally to point out to the Court what "Federal Law" is being applied. Aside from the constitutional issues, what are the federal legal principles that would be invoked to construe and regulate the nature, duration and effect of this Louisiana mineral servitude? This question is particularly appropriate since the mineral servitude is a property concept completely unique to Louisiana.

Obviously there is no federal statute dealing with a Louisiana mineral interest. In this type of situation (and even assuming the application of Federal Law) the Court would be forced to apply the principles of general contract law. *Priebe & Sons v. United States,* 332 U.S. 407, 411 (1947).

The only general contract law appropriate to these servitudes would be the law of Louisiana, since the situs of real property governs the effect of contracts dealing with such property. *United States v. Fox* and *United States v. Burnison, supra.* Respondents suggest, therefore, that the federal law — state law argument really presents nothing substantial since the same result will obtain under either approach. Therefore, we are back to the supervisory opinion of the Louisiana Supreme Court on the precise subject with which this Court must deal.

II.

The Mineral Reservations Involved Here Clearly Are Covered By Louisiana Act 315, As That Statute Has Been Construed By The Louisiana Supreme Court.

The Government's brief (pages 13-16) asserts that even assuming the application of state law, Act 315 of 1940 does not apply to the servitudes of respondents because the reservations were made for a specified term. To say the least, the contention is rather startling. It is squarely contrary to the interpretations given by both courts below and, more importantly, it represents a complete misconstruction of the specific holding of the Louisiana Supreme Court in its advisory opinion.[8]

The Lake Misere reservations (*infra*, page 1a) provided that the reserved mineral rights would remain in force for a term of ten years *and as long thereafter* as minerals are produced or drilling operations are continued at fixed intervals. It then provided that if at the end of the ten-year period the rights had not been extended by operations or production, the servitudes would terminate.[9] As we understand the Gov-

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[8] *Leiter Minerals, Inc. v. California Company*, 241 La. 915, 132 So.2d 845 (1961).

[9] The Lake Misere reservations track the statutory law of Louisiana governing mineral servitudes much more closely than did the Leiter servitude, which had several time and acreage restrictions. For example, a drilling well at the end of 10 years would only hold 25 acres under the Leiter servitude, whereas such a well would extend the entirety of each of the Lake Misere

ernment's argument, it is to the effect that the original reference to the ten-year period caused the servitude to be one for a fixed and certain time and that the parties' agreement for a period of contractual prescription related only to the renewal of the servitude.

Complete answers to the Government's erroneous construction of the Lake Misere servitudes are found in the following excerpts from the advisory opinion of the Louisiana Supreme Court in *Leiter:*

> "Counsel for Leiter argue with much force that the reservation does not establish a servitude for a fixed or certain time. If this is true, the Louisiana law on servitudes of specific duration, set forth by us above in our discussion of the government's lessees' contention, is without application.
>
> "Most mineral servitudes are not established for a fixed time. A servitude *of indefinite duration* is *extinguished* only when it is not *exercised* for a period of *10 years*. Such a servitude created by mineral reservation in a sale to the government would, under Act 315 of 1940, be rendered imprescriptible and would never be lost by prescription, provided it was in existence at the time the 1940 act went into effect

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servitudes. This is exactly the result obtained from statutory prescription under Louisiana law, and the only contractual limitation was that thereafter drilling must be continuous until production was obtained.

(241 La. at 938, 132 So.2d at 843.) (Emphasis added.)

* * * *

"Nevertheless contracting parties are at liberty to establish a contractual period of prescription for the conditional extinguishment of the servitude through non-use, provided the period is *10 years* or less. (241 La. at 940, 132 So. 2d at 853-854.) (Emphasis added.)

* * * *

"Where mineral rights in lands sold to the United States government are reserved for a certain, definite, and fixed time *in the contract*, or, in other words, where the servitude has been established for a certain or fixed time, at the expiration of the time fixed the servitude is lost or extinguished; and since in such a case there is no question of prescription, Act 315 of 1940 is without application."[10] (241 La. at 937, 132 So.2d at 853.) (Emphasis added.)

Two things are crystal-clear from the quotations just given. The first is that, contrary to the Government's argument, reference to a period of ten years does not prevent the servitude from being of indefinite duration if its extinguishment at the end of the ten-year period is uncertain. Secondly, the reservations must be tested by the question of whether or not, *as initially established*, they were for a fixed or certain time or

[10]The references to the 10-year period are based on the statutory

they were of indefinite duration. The Government's brief recognizes (page 14) that the conveyance provided for "an indefinite extension, or renewal, of the servitudes *if* at the end of the stipulated ten-year term, minerals were being produced or drilling operations were then in progress." (Emphasis added.) The Government then concedes that to that extent, the reservations did provide for a period of contractual prescription for conditional extinguishment of the mineral servitudes.[11]

When these concessions by the United States are viewed in the light of the clear mandate of the Louisiana Court that the nature of the servitude must be determined as of the time it is established, the Government actually is conceding that the Lake Misere reservations were of indefinite duration and therefore presented cases of contractual prescription. This must follow because it is completely obvious that at the time that the servitudes were created by the reservations, it was impossible for either party to know whether they would be extended beyond the ten-year period by drilling operations or production.

The Louisiana Supreme Court in its advisory opinion cited as an example of a servitude of specific duration

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liberative prescription of 10 years provided for by Louisiana Civil Code Articles 789 and 3546.

[11]"It is true, as the courts below emphasized, that the conveyance also provided for an indefinite extension, or renewal, of the servitudes if, at the end of the stipulated ten-year term, minerals were being produced or drilling operations were then in progress. To that limited extent perhaps it can be said that the reservations provided 'for a period of contractual prescription for the conditional extinguishment of the mineral servitudes'

the one created by the mineral reservation considered in *Hodges v. Norton,* 200 La. 614, 8 So.2d 618 (1942). That reservation provided:

> "... and there is specifically reserved, *for a period of Fifteen years from and after this date* an undivided one-half interest in and to all oil, gas and mineral rights. . . ." (200 La. at 617-618, 8 So.2d at 619.) (Emphasis added.)

The Louisiana court then made this significant comment concerning the Hodges reservation:

> "Counsel for the government's lessees argue that the mineral reservation in that case is similar to the reservation in the Leiter deed. For what it may be worth, *our opinion is that it is not.*"[12] (Emphasis added.)

If the Louisiana Supreme Court found that the Leiter reservation, with its several time restrictions, was not one for a fixed and certain term, clearly the Lake Misere servitudes cannot be placed in that category.

When it is recognized, as indeed it must be, that these reservations created cases of contractual prescription, there can be no doubt but that Act 315 is controlling. The Louisiana Court squarely held that the statute applied equally to both statutory and contractual prescriptions, saying:

(Pet. App. A, p. 6a, Pet.App. B, p. 17a)." Page 14, Brief of the United States.

[12]*Leiter Minerals Inc. v. California Company,* 241 La. 915, 936, 132 So.2d 845, 852 (1961).

> "'The act [315 of 1940] draws no distinction between statutory and contractual prescription, and, as we view the matter from the history of the act and the objects and purposes for which it was adopted, it is manifest that the Legislature intended the act to be applicable to prescription whether established by statute or by contract where prescription had not already accrued at the time the act became effective.'"[13]

This is the clear rule that the United States has steadfastly refused to accept. It continues to argue that even if a case of contractual prescription is involved, it held a vested contract right which could not be impaired. Respondents assert to the contrary that this case presents nothing more than would be involved with an ordinary statutory servitude such as that considered by the Fifth Circuit Court in the *Nebo*[14] case and that, therefore, the Government held only an expectancy or hope which was validly abrogated by Louisiana Act 315 of 1940.

The District Court in the present case held that "[C]learly, the provisions of the reservations in the instant cases reveal that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitudes."[15] The Fifth Circuit Court of Appeals quoted this language of the District Court approvingly and added: "Thus,

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[13] *Leiter Minerals, Inc. v. California Company*, 241 La. 915, 939, 132 So.2d 845, 854 (1961).

[14] *United States v. Nebo Oil Company*, 190 F.2d 1003 (5th Cir. 1951).

[15] *United States v. Little Lake Misere Land Company, Inc.*, Civil Action No. 14588 (W.D.La. 1971). *See* Appendix 43, et seq.

under Act 315 the mineral reservations were imprescriptible."[16]

III.

The Migratory Bird Conservation Act Invites Rather Than Rejects The Application Of State Law To The Mineral Servitudes Involved In This Case.

Woven throughout the Government's brief is the argument that the Migratory Bird Conservation Act[17] established a national program for the protection of wildlife which insulated the federal interests acquired under it from local land law and required the application of federal law. The statute does no such thing; to the contrary, it compels the opposite conclusion that Congress deliberately invited the application of state law to the acquisitions made under the Act.

There can be no doubt but that Congress could have preempted the field in the national interest in adopting this statute. The Outer Continental Shelf Lands Act (43 U.S.C. 1333a) is a clear example of the adoption of an area of exclusive federal jurisdiction. As was said by this Court of that statute in *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352, 365 (1969), "the applicable law was made federal law enforceable by federal officials in federal courts."

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[16] *United States v. Little Lake Misere Land Company, Inc.*, 453 F.2d 360, 362 (5th Cir. 1971).

[17] *Infra*, pp. 2a-4a.

The stark contrast between the OCS Act and the Migratory Bird Conservation Act can readily be seen through the following analysis of the latter statute:

(1) The Migratory Act did not establish a national policy for the purchase *in fee* of properties for the conservation of migratory game birds. Section 715d authorized the Secretary of the Interior to purchase *or rent* such properties.

(2) Section 715e specifically authorized the purchase of lands subject to rights of way, easements and reservations which in the opinion of the Secretary would not interfere with the use of the areas for wildlife purposes.[18]

(3) Section 715e also provided that any reservations or other rights retained by the grantor would be subject to the wildlife regulations of the Secretary and that "it shall be expressed in the deed or lease" that the reservation would be subordinate to these regulations. Neither the deed nor the judgment in this case had any "expression" whatever concerning the regulations. See App., pp. 29 and 38.

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[18]The insertion of the mineral reservation in the conveyance and judgment of condemnation is of itself clear evidence that the Secretary of the Interior had determined that mineral exploration and the existence of mineral servitudes affecting the game refuge would not interfere with the use of the refuge.

(4) Rather than preempting the field, Section 715f prohibited any acquisition under the Act unless the State shall have first consented to that acquisition. That consent was not obtained in connection with these acquisitions.

(5) In lieu of establishing exclusive federal jurisdiction, Section 715g expressly preserved the jurisdiction of the State over the areas to be acquired.

In arguing that the Migratory Act requires the application of federal law to any acquisitions made under its terms, the Government fails completely to distinguish between congressionally established federal legislative *jurisdiction* and federal *title* to the land. The OCS Act previously discussed is an example of the first; the acquisition of properties under the Migratory Act is an equally clear example of the second. Where Congress makes no specific provision for the application of federal law, state law will be applied, and in these situations, only the federal title to the land is involved.

While the United States refuses in this case to recognize that the Migratory Act did not establish exclusive federal jurisdiction over the lands acquired under its terms, the Department of Justice has previously done so. In a publication by the Lands Division of the Department entitled "Federal Eminent Domain", Section 32B, page 238, et seq. (*infra,* pp. 4a-6a, et seq.) an extended discussion was made of the Weeks Fores-

try Act (16 U.S.C. 480)[19] and the Migratory Bird Conservation Act. In discussing the two acts, this was said:

> "*Under the Migratory Bird Conservation Act, the Secretary of Agriculture may accept no deed to land acquired unless the consent of the state is given by law.* Under the Upper Mississippi River Wild Life & Fish Refuge Act the land may not be acquired until the consent of the legislature of the state to the acquisition in fulfillment of the purpose of the Act is had. The proviso as to purpose in two of the Acts seems to mean that if the land were diverted to some other purpose, the consent would be inoperative. *In the Weeks Act and the Migratory Bird Conservation Act it is specifically provided that the states shall not lose their jurisdiction over the land acquired, and jurisdiction is consequently the same as if no state consent had been given, even when the property continues to be used for the purpose for which it was taken.* Since it thus appears the consent required by both of these Acts, unlike that required by Section 355 of the Revised Statutes prior to the 1940 amendment, *is not for the purpose of vesting in the United States exclusive jurisdiction over the sites,* such consent cannot be regarded as dispensed with by that amendment. Because the Upper Mississippi River Wild Life & Fish Refuge Act is so similar in

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[19]This statute, which is identical in its purpose and scope with the Migratory Act, was the one considered in *United States v. Nebo Oil Company, Inc.*, 190 F.2d 1003 (5th Cir. 1951).

nature to the Weeks Forestry and Migratory Bird Acts, it is probable that the consent provision embodied therein was likewise not designed to vest exclusive jurisdiction in the United States and therefore is also not dispensed with by the 1940 amendment." (Footnotes and footnote references omitted.)[20]

Remembering the striking similarity between the Weeks Act and the Migratory Act, the decision of this Court in *Wilson v. Cook*, 327 U.S. 474 (1946) is significant. In holding that the State of Arkansas retained jurisdiction over lands acquired under the Weeks Act, this was said:

"Hence the statute [the Arkansas consent statute] cannot be taken as having yielded or intended to surrender to the Federal Government the state legislative jurisdiction over the area in question, so far as exercise of that jurisdiction is consistent with federal functions. Any doubt as to the effect of such a grant by the state in conferring exclusive legislative jurisdiction over the territory which is acquired by the Federal Government *is removed by the provisions of the federal statute.*

"Section 12 of the federal statute, authorizing the purchase, provided:

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[20]United States Department of Justice, Federal Eminent Domain, a Manual prepared in the Lands Division of the Department of Justice under the direction of Attorneys General Homer Cummings, Frank Murphy and Robert H. Jackson. Washington, U.S. Government Printing Office (1940).

> 'That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands. . . .'" (327 U.S. at 486.) (Emphasis added.)

In a further comment the Court in the *Wilson* case said: "By this [Weeks] enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect ..." (327 U.S. at 486).

The limited scope of the Migratory Act insofar as federal jurisdiction is concerned was succinctly described in *United States v. Carmack*, 329 U.S. 230 (1946) where both the Weeks Acts and the Migratory Act were discussed:

> "When Congress has wished to subordinate its selection of state lands to state approval it has done so by express provision. In the Weeks Forestry Act of March 1, 1911, 36 Stat. 961, 962, 43 Stat. 1215, 45 Stat. 1010, 48 Stat. 955, 16 U.S.C. §516, 16 U.S.C.A. §516, and the Migratory Bird Conservation Act of February 18, 1929, 45 Stat. 1222, 1223, 16 U.S.C. §715f, 16 U.S.C.A. §715f, the consent of the state legislature to the federal acquisition of land is made an express condition of the acceptance of such land. *Such consent does not deprive the state of civil or criminal jurisdiction over the land.* 36 Stat.

963, 16 U.S.C. §480, 16 U.S.C.A. §480, and 45 stat. 1224, 16 U.S.C. §715g, 16 U.S.C.A. §715g. See also, The Upper Mississippi River Wild Life and Fish Refuge Act of June 7, 1924, 43 Stat. 650, 16 U.S.C. §724, 16 U.S.C.A. §724.

"*The acquisition of federal legislative jurisdiction, as distinguished from federal title to the land, is a different matter.* If the Federal Government desires exclusive legislative jurisdiction over land acquired by it, the Constitution indicates that the consent of the state in which the land is located is necessary."[21] (Emphasis added.)

Actually, the State of Louisiana has never consented to the acquisition of these lands as required by the Migratory Act. The United States argues that that consent was obtained through Act 12 of the Louisiana Statutes of 1892 and incorporates that statute (page 33) in the Appendix to its brief. But a mere reading of the title of Act 12 shows that it was dealing solely with "ceding jurisdiction" to the United States rather than conferring consent to the acquisition of state lands. The title of the Act provides:

"To cede jurisdiction to the United States over certain land and for the purchase and condemnation thereof."

As has been noted both from the Department of Justice publication and from *United States v. Carmack*,

[21]*United States v. Carmack*, 329 U.S. 230, n. 10 at 240-241 (1946).

the Migratory Act required the specific consent of the State to the acquisition of *title* rather than a cession of *jurisdiction*. The 1892 Act did not accomplish this. Also, since the deed and judgment failed completely to comply with Section 715e by making the reservations subject to the Secretary's regulations, the United States simply is in no position to assert federal supremacy under the Migratory Act. The lengthy footnote discussion in the Government's brief (fn. 8, page 20) concerning the importance of a careful regulation of the area as a game refuge hardly seems appropriate when the United States failed to insure that protection in its acquisitions.

Respondents submit, contrary to the Government's arguments, that the Migratory Act deliberately avoided any assertion of exclusive federal jurisdiction over the lands acquired under its terms, and that in any event, the failure of the Government to comply with Sections 715e and 715f of the Act effectively prevents it from challenging the application of state law.

IV.

There Are No Valid Constitutional Impediments To The Application of Act 315 of 1940 In This Case.

A. *A Procedural Challenge.*

Respondents challenge the effort of the United States to attack the constitutionality of Act 315 of 1940. As previously noted, that issue has never been raised as

an affirmative claim in the government's pleading, and it cannot now be asserted in the briefs before this Court. *Kewanee Oil & Gas Company v. Mosshamer*, 58 F.2d 711 (10th Cir. 1932); *Gaines W. Harrison & Sons, Inc. v. J. I. Case Company*, 180 F.Supp. 243 (E.D.S.C. 1960); *Alexander v. Daugherty*, 189 F. Supp. 956 (D.C.Wyo. 1960); *Pigott v. Detroit T. & I. R.R.*, 221 F.2d 736 (6th Cir. 1955); *Houck v. Eastchester Public Utility District*, 104 F.Supp. 588 (D.C.Alaska 1952); *Mount Tivy Winery, Inc. v. Lewis*, 42 F.Supp. 636 (N.D.Cal. 1942); *United States v. Nudelman*, 104 F.2d 549 (7th Cir. 1939) and *White Cleaners & Dyers v. Hughes*, 7 F.Supp. 1017 (W.D.La. 1934). In the *Kewanee Oil & Gas Company* case, this was said by the Tenth Circuit Court:

> "From the record it appears that the constitutionality of section 7969 of the Oklahoma Statutes was not raised by the pleadings or by demurrer, but at the time of the trial by an objection to the introduction of evidence.
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> * * * *
>
> "We therefore conclude that the contention that the state statute is unconstitutional is an affirmative defense, and must be so pleaded." (58 F.2d at 712).

There has been no abrupt change in the law since this action was filed, cf. *Curtis Publishing Company v. Butts*, 351 F.2d 702 (5th Cir. 1965) and therefore the United States is effectively barred from asserting the

constitutional questions since they were not affirmatively raised in the Lower Court.

In its reply brief filed in connection with the writ application, the United States defended its right to raise the constitutional issues by asserting (correctly) that they were considered in both of the courts below. This is unimportant since they were never *pleaded*. The tabulation of relevant docket entries in the single Appendix reflects that answers were filed on behalf of respondents in both of the original suits on July 30, 1969. In each of these answers, the application of Act 315 of 1940 was specially pleaded. The Government's motion for summary judgment was not filed until October 5, 1970. The constitutional issues should have been raised in that pleading. This was not done.

B. *The Right Of The United States Was A Mere Hope Or Expectancy And Not A Vested Property Interest.*

Under the law of Louisiana, there can be no estate in oil, gas or other minerals separate from the ownership of the land. The sale or reservation of mineral rights creates only a servitude (easement under common law) upon the land involved. That servitude is extinguished by the 10-year prescription of non-use unless the right is exercised within that time. The use of the servitude by drilling will interrupt the running of prescription and preserve the rights for an additional 10 years.[22]

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[22] *Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co.*, 149 La. 100, 88 So. 723 (1921); *Louisiana Petroleum Co. v. Broussard*, 172 La. 613, 135 So. 1 (1931); *Lee v. Giauque*, 154 La. 491, 97 So. 669 (1923); La.Civ.Code Arts. 789, 3546 (1870).

One who owns land subject to an outstanding mineral reservation possesses no vested property interest, inasmuch as "estates in reversion" are unknown to Louisiana law. Such an owner of the land possesses only a hope or expectancy to acquire these mineral rights; and perhaps the clearest proof that no vested property interests exists is that this hope or expectancy is not an object that can be legally sold.[23]

The foregoing rather basic discussion relates to the normal statutory servitude created by a mineral sale or reservation. Actually, there are three types of mineral servitudes recognized by the law of Louisiana. They are:

(1) One established by contract for a fixed period, e.g. 8 years. Nothing can extend its life.

(2) A normal statutory servitude where the minerals are reserved without qualification. Such a servitude expires in 10 years unless the 10-year prescription is interrupted by drilling operations or production.

(3) A servitude of indefinite duration established by contract where, as originally established, its extinguishment at the end of 10 years is conditional upon the uncertain

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[23]*Hicks v. Clark*, 225 La. 133, 72 So.2d 322 (1954); *Liberty Farms v. Miller*, 216 La. 1023, 45 So.2d 610 (1950).

> fact of whether drilling operations would be commenced or production would be obtained prior to that date. After the 10-year period, limitations on the further extension of the servitude are usually made, such as a requirement for continuous drilling. This is a classic case of contractual prescription. The servitudes involved in this case fall in this category.

The Louisiana Supreme Court has said in its advisory opinion in *Leiter* that the fixed-term servitude (Item 1) cannot constitutionally be extended by subsequent legislation such as Act 315. However, the Court was equally as positive that the statutory servitude and the servitude involving contractual prescription (Items 2 and 3) are identical in that the purchaser owns only a hope or expectancy of the termination of the servitude by prescription, and that this hope can be validly abrogated by subsequent legislative action. *Leiter Minerals, Inc. v. California Company,* 241 La. 915, 132 So.2d 845 (1961).

Thus, the United States has never owned the mineral rights in this land. They were reserved from the sale and the judgment of condemnation by the Lake Misere group, with the reservations presenting cases of contractual prescription. The limited nature of the United States' hope or expectancy to acquire these mineral rights was succinctly explained in *United States v. Nebo Oil Company*[24] as follows:

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[24]190 F.2d 1003, 1009 (5th Cir. 1951). The Fifth Circuit Court further held that the Louisiana Supreme Court decision in

> "We conclude that this so-called 'reversionary interest' is nothing more than a mere expectancy, or hope, based upon an anticipated continuance without change of the applicable laws of prescription and cannot be regarded as a vested right protected by the Constitution."

The United States appears to accept the *Nebo* ruling. It referred to the language of the Court in that case concerning the Government's "hope" of acquiring title to the mineral rights as being a mere "expectation," which could be modified at the will of the State. However, the United States then falls into serious legal error when it refuses to accept the concept that the same legal principles invoked in *Nebo* are equally applicable to a case of contractual prescription. This error is seen in the following quotation taken from page 25 of the Government's brief:

> "In the present case, the government's right — whether or not characterized as 'contractual prescription' — is derived solely from the express provisions agreed to in the deed of purchase and the condemnation judgment; it depends in no degree upon the law of Louisiana. It is a property right of very substantial value, which was bargained for, reflected in the consideration paid, and specified in private contracts."

Whitney National Bank v. Little Creek Oil Company, 212 La. 949, 33 So.2d 693 (1947), holding that Act 315 must be given retrospective effect when applied to this hope or expectancy, was binding on the Federal courts.

At this juncture, the Government is accepting only one-half of the applicable Louisiana law and is rejecting the remaining half. The segment that it is repudiating is the foursquare ruling of the Louisiana Supreme Court that there is no legal difference between statutory and contractual prescription and that Act 315 of 1940 applies equally to both. The language of the Louisiana Court is worth repeating on this point. It is as follows:

> "The act draws no distinction between statutory and contractual prescription, and, as we view the matter from the history of the act and the objects and purposes for which it was adopted, it is manifest that the Legislature intended the act to be applicable to prescription whether established by statute or by contract where prescription had not already accrued at the time the act became effective."[25]

Also in arguing that its rights are derived solely from the deed and judgment and do not depend upon the law of Louisiana, the Government ignores the fact that it is the law of Louisiana that gives "legal effect" to a contract which the parties have entered into. This is illustrated by the State Supreme Court in *State ex rel. Bulkley v. Whited & Wheless, Ltd.*, 104 La. 125, 28 So. 922 (1900). where the Court said, at p. 133:

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[25]*Leiter Minerals, Inc. v. California Company*, 241 La. 915, 939, 132 So.2d 845, 854 (1961).

> "Parties are at liberty to make contracts so long as they are legal, and to agree upon accidental stipulations; but where they actually make a contract with *fixed legal essentials* they are powerless to control *the legal effect of the contract itself.* The contract being made, *the law governs its results.* Cooley v. Broad, 29 La.Ann. 347." (Emphasis added.)

Cooley v. Broad, cited by the Court in the extract just quoted, anounced the rule as follows:

> "When there exist all the conditions which, by law, create a legal relation, *the effects flowing legally from such relation will follow, whether the parties foresaw and intended them or not.* Thus where a man transfers to another for a sum of money, and absolutely, the ownership of a thing belonging to him, the contract between them is that of sale, and *all the legal consequences of that relation will follow, even though the parties declare it not a sale, but some other contract.*" (29 La.Ann. at 347) (Emphasis added.)

Wier v. Texas Company, 180 F.2d 465 (5th Cir. 1950) is a perfect example of a situation where the court determined the "legal effect" of a contract regardless of its descriptive language; and this decision is particularly appropriate here since it dealt with the reservation of mineral rights from a sale. In the *Wier* case, the vendor purported to reserve from the sale title *in fee,* together with all the minerals, underlying and below a depth of 500 feet from the surface of the property. The Fifth Circuit Court rejected this approach -

and held that only a mineral servitude was created by the reservation. Respondents feel that this decision is a perfect example of the court giving to a mineral reservation the only legal effect that the law of Louisiana authorized. Applied to the present case, the two reservations clearly can be given legal effect under the advisory opinion of the Louisiana Supreme Court in *Leiter* by recognizing that they involve cases of contractual prescription and therefore are subject to the same principles of Louisiana law that deal with statutory prescription.

Once it is recognized that the mineral reservations involved here present cases of contractual prescription and thus were subject to the operation of Act 315 of 1940, the Government's argument concerning impairment of contract becomes completely inapplicable.

The federal law is quite clear that statutes of limitation which exist when a contract is executed, do not form a part of that contract, and may be modified or abrogated with respect to a preexisting contract. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); *Campbell v. Holt*, 115 U.S. 620 (1885); *Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, 258 U.S. 190 (1922) and *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). In *Campbell v. Holt*, this Court even extended the rule to upholding state action in extending a statute of limitation after the right of action had been barred under the original statute, thereby restoring to the plaintiff his remedy. In enunciating this rather drastic conclusion, the Court noted, "It violates no right of his, therefore, when the legislature says time

shall be no bar, though such was the law when the contract was made." (115 U.S. at 628). *Chase Securities Corp. v. Donaldson* reaffirmed the *Campbell* case on this point.

The impact of these cases with respect to the application of Act 315 of 1940 was succinctly analyzed in *Nebo*, where the Court said:

> "Nor is there any merit in the contention that Act 315 of 1940 violates the contract clause of the Federal Constitution. The obligation of a contract consists in its binding force on the party who makes it, which, in turn, depends on the laws in existence when it is made. These laws form a part of the contract as the measure of the obligation to perform by the one party and the right acquired by the other. McCracken v. Hayward, 43 U.S. 608, 612, 2 How. 608, 11 L.Ed. 397. However, laws of evidence, or which concern remedies, acts of limitation, and many other subjects may affect the validity, construction, duration, or discharge of contracts, *but changes in these laws are not regarded as necessarily affecting the obligation of contract.* [Citing authorities.]
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> "It is generally held that laws of limitation or prescription go to matters of remedy. But beyond this workable concept lies the principle that their shelter is not a fundamental right of the individual, it is a right given by the State for purposes of its own and not because of the

merits of the obligation. 'The right does not enter into or become a part of the contract.' Such statutes may be modified by shortening the period prescribed, providing the time is still running and a reasonable time remains for commencement of the action, *or may be lengthened until such time as the bar of the statute is complete and property rights have vested.* Cooley's Constitutional Limitations, page 761, et seq."[26] (Emphasis added.)

When Act 315 of 1940 became effective, the two mineral servitudes, as originally established, were less than 10 years old. On the 1940 date, each was fully effective and in all respects was identical with an ordinary statutory servitude such as the one involved in *Nebo*.[27] Both were subject to the uncertain possibility that they would be extended by drilling or production. Act 315, by making the servitudes imprescriptible, removed the prescription that was then accruing. No property right to the minerals had then vested in the United States, and the only interest of the United States that was affected was the abrogation of its inchoate hope or expectancy that the minerals eventually would revert to it.

The state law is similarly clear that the laws of prescription may be modified so long as no vested rights

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[26] *United States v. Nebo Oil Company*, 190 F.2d 1003, 1009 (5th Cir. 1951).

[27] *United States v. Nebo Oil Co.*, 190 F.2d 1003 (1951).

are divested. *See DeArmas v. DeArmas*, 3 La.Ann. 526 (1848); *Shreveport Long Leaf Lumber Co. v. Wilson*, 195 La. 814, 197 So. 566 (1940); *State v. Alden Mills*, 202 La. 416, 12 So.2d 204 (1943). The Supreme Court of Louisiana in *Whitney National Bank of New Orleans v. Little Creek Oil Company, Inc.*,[28] gave a retrospective effect to the very act involved in the present case (Act 315 of 1940), and applied it to a reservation of minerals in a sale to the United States.

No useful purpose would be served by discussing the several decisions offered by the United States in support of its Property Clause and Contract Clause arguments. All dealt with the impairment of rights that unquestionably were vested property or contract interests. It is clear that in the present case no vested property right existed by virtue of the hope or expectancy of the United States to the minerals created in the two transactions involved here. Act 315 of 1940 could and did validly modify that hope or expectancy so as to make the then-existing mineral rights of the respondents imprescriptible.

C. *The Hostile Discrimination Charge.*

The Government suggests that Act 315 of 1940 singles out the United States and its lessees for hostile discrimination in the acquisition of interest in lands in violation of the Equal Protection Clause of the Fourteenth Amendment. The application for writ properly notes that there are no federal decisions holding the

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[28]212 La. 939, 33 So.2d 693 (1947).

United States to be a "person" entitled to the protection of the Fourteenth Amendment and that this proposition was seriously questioned by this Court in *United States v. Burnison*, 339 U.S. 87, 95 (1950). The Government persists in its contentions, however, that a state cannot discriminate against federal interests.

The hostile discrimination theory has twice been rejected by this Court, and the present contention of the Government represents the third frontal assault upon the law as firmly established. In *United States v. Fox*, 94 U.S. (4 Otto) 315 (1877), this Court upheld a statute of the State of New York which had been construed to prevent the devise by will of the property of a decedent to the United States. The bequest to the Government was therefore nullified. The issue was again raised in *United States v. Burnison*, 339 U.S. 87 (1950), where the Court considered a California statute which prohibited an unrestricted testamentary gift to the United States, although it permitted such gifts to the State and its subsidiaries. The Court recognized that it was being called on to overrule the *Fox* case and firmly refused to do so. It found no arbitrary treatment of the Government and therefore rejected the claim of unconstitutional discrimination.

The fact that the United States is the largest landowner in Louisiana would alone justify singling it out for special statutory treatment. The passage of Act 315 of 1940 reflected in a sense the desire of the state to permit continued purchases by the United States, which purchases would otherwise have been forestalled by parties who were fearful of losing their min-

eral rights. The Louisiana Supreme Court summarized these considerations as follows:

> "Over the years the federal government has acquired huge tracts of land in this state for such purposes as wild life and game refuges, national forests, spillways, military installations, and camps, and it is now the largest landowner in this state.
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> * * * *
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> "These various tracts were bought by the government at a relatively low price per acre, evidently because the vendors in most cases reserved the mineral rights, which were, potentially at least, much more valuable than the lands, and the federal government in such sales where the mineral rights were reserved did not expect or intend to acquire the mineral rights. The government, however, had some difficulty in acquiring these lands as their owners did not wish to sell unless they could reserve the oil and gas for a longer period than 10 years without use. In some cases the agents of the United States advised the vendors that the Louisiana law of prescription for non-use did not apply to lands purchased by the United States, and some sales could not have been effected by the government if its representatives had taken the position that the Louisiana law of prescription applied. The government did

not have this particular problem in purchasing lands in other states because no restriction prevented the landowners there from reserving the minerals in perpetuity. Under these circumstances the Louisiana Legislature adopted Act 315 of 1940 to preserve to the vendors the mineral rights in tracts sold to the government and to facilitate the government's acquisition of lands in Louisiana. Thus, one of the primary purposes of Act 315 of 1940 was to keep prescription from running against mineral rights which were reserved when the land was sold to the United States." [*Leiter Minerals, Inc. v. California Company*, 241 La. 915, 932, 132 So.2d 845, 851 (1961)]

The foregoing abundantly demonstrates that Act 315 is merely designed to cure a special problem growing out of Louisiana's unique civil law property system. This problem exists with respect to *all* governmental bodies, not just the United States. By a separate statute, the State of Louisiana has imposed the identical imprescriptibility rule on all acquisitions made by its own agencies. La.R.S.. 9:5806B (Supp. 1972)[29] Also, individual Louisiana citizens as well as governmental entities have been affected by legislation changing the rule of prescription. Prior to 1944, the law of Louisiana was firmly to the effect that the ownership of an interest in a mineral servitude by a minor suspended the

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[29]It is interesting to note that the United States, while persisting in its claim of unilateral hostile discrimination, terms this equal treatment by the State of its own agencies as irrelevant. United States brief, fn. 13 at p. 27.

running of prescription not only as to the minor, but also as to his major co-owners. Act 232 of 1944 changed this law to provide that:

> ". . . despite the fact that among co-proprietors of any mineral ... right there [may] be ... a minor, the liberative prescription shall nevertheless run against the co-proprietors not under legal disability."

The Supreme Court of Louisiana upheld this statute against constitutional attack in *Cooper v. Lykes*, 218 La. 251, 49 So.2d 3 (1950).

D. *The Condemnation Proceedings.*

The brief of the Government (page 22) stresses that a portion of the property was acquired by condemnation proceedings and that in this type of acquisition, the estates and interests created by declarations of taking must be determined by federal law. On this point, it is noteworthy that only a comparatively small portion of the property was acquired by condemnation, with the remainder having been purchased by a conventional deed.[30] Furthermore, this was not a true case of condemnation at all. The judgment was rendered pursuant to a joint stipulation of the United States and the grantors requesting that it be rendered on the form submitted to the Court.[31] For all purposes,

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[30]The stipulation of fact shows that of the 12,625 acres of land involved, only 2,574.18 were acquired in the condemnation proceeding, whereas the remaining 10,048.01 acres were acquired by a conventional act of sale. App. p. 22, et seq.

[31]App., p. 28.

therefore, this was an agreed judgment that had no more effect than a conventional deed.

If Act 315 had purported to dictate the terms of the federal condemnation and thereby attempted to interfere with the Government's right to condemn, there would be force in the Government's argument. This is not the case at all. The Government chose to tailor its condemnation proceedings so as to permit a mineral reservation identical in terms with the ones employed in its conventional purchases. Obviously this was done in fairness to those from whom the property was taken and to insure a uniform type of mineral reservation. The net result, however, is that the Government deliberately chose to permit the mineral reservation and once having done this, the condemned lands were in exactly the same legal position as were those actually purchased. This is particularly true in view of the joint stipulation of the parties discussed above.

The United States relies principally upon the decision of this Court in *United States v. 93.970 Acres of Land*, 360 U.S. 328 (1959) in support of its argument that the mere resort to condemnation proceedings makes federal law applicable and controlling. That case involved nothing more than a question of procedural conflict between Illinois law and federal procedure. The Government, however, relied on the dictum of the Court that where "essential interests" of the Federal Government are concerned, federal law must control unless Congress chooses to make state law applicable. It has previously been demonstrated that the Migra-

tory Act refused to assert any paramount national interest, but rather made applicable the laws of Louisiana to properties purchased pursuant to its terms.[32]

CONCLUSION

The combination of the decisions of the United States Supreme Court and the Louisiana Supreme Court relating to the very Louisiana statute now under consideration overwhelmingly supports the affirmance of the judgment of the Fifth Circuit Court.

Respectfully submitted,

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[32]See discussion at pp. 17-24, *supra*.

ADDENDUM

Act 315 of 1940

Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.

Section 2. That Act 68 and Act 151 of 1938 and all other laws or parts of laws, general or special, in conflict herewith are hereby repealed.

The Lake Misere Reservation

Reserving unto the grantor, its successors, legal representatives and assigns, and specifically excepting from this acquisition, all the oil, gas, sulphur and other minerals in, on or under said land, together with the right of investigating, exploring, prospecting, drilling and mining for and producing said oil, gas, sulphur and other minerals, laying pipe lines, building tanks, power stations, telephone lines and other structures, thereon to produce, save, take care of, treat, store, transport and manufacture said minerals and housing

the employees necessary for said purposes; which rights shall remain in force for a term of ten (10) years from the date of vesting of title in the United States and as long thereafter as oil, gas, sulphur or other mineral is produced from said land, or so long thereafter as grantor shall conduct drilling or reworking operations thereon with no cessation of more than sixty (60) days consecutively until production results; and, if production results, so long as such mineral is produced.

Provided further that at the end of said ten-year period of reservation, if not extended as hereinabove provided, or at the termination of any extended period in case the operation has not been carried on after said ten-year period as hereinabove provided, the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate at the end of said ten years, and the complete fee title to said lands shall thereby become vested in the United States.

Provided that forty per cent, (40%) of one-eighth (1/8) royalty of all oil, gas, sulphur and other minerals so removed shall be paid to the United States of America until the total royalties so paid to the United States shall equal the purchase price of $12,870.90.

The Migratory Bird Conservation Act
16 U.S.C. § 715d-715g

§ 715d.

The Secretary of the Interior is authorized to purchase or rent such areas as have been approved for purchase or rental by the commission, at the price or prices fixed by said commission, and to acquire

by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for such purposes, and to pay the purchase or rental price and expenses incident to the location, examination, and survey of such areas and the acquisition of title thereto, including options when deemed necessary by the Secretary of the Interior from moneys to be appropriated hereunder by Congress from time to time: *Provided*, That no lands acquired, held, or used by the United States for military purposes shall be subject to any of the provisions of sections 715-715d, 715e, 715f-715k, and 715l-715r of this title.

§ 715e.

The Secretary of the Interior may do all things and make all expenditures necessary to secure the safe title in the United States to the areas which may be acquired under sections 715-715d, 715e, 715f-715k, and 715l-715r of this title, but no payment shall be made for any such areas until the title thereto shall be satisfactory to the Attorney General or his designee, but the acquisition of such areas by the United States shall in no case be defeated because of rights-of-way, easements, and reservations which from their nature will in the opinion of the Secretary of the Interior in no manner interfere with the use of the areas so encumbered for the purposes of said sections, but such rights-of-way, easements, and reservations retained by the grantor or lessor from whom the United States receives title under said sections or any other Act for the acquisition by the Secretary of the Interior of areas for wildlife refuges shall be subject to rules and regulations prescribed by the Secretary of the Interior for

the occupation, use, operation, protection, and administration of such areas as inviolate sancuaries for migratory birds or as refuges for wildlife; and it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements, and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease or, if deemed necessary by the Secretary of the Interior, to such rules and regulations as may be prescribed by him from time to time.

§ 715f.

No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715-715d, 715e, 715f-715k, and 715l-715r of this title unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.

§ 715g.

The jurisdiction of the State, both civil and criminal, over persons upon areas acquired under sections 715-715d, 715e, 715f-715k, and 715l-715r of this title shall not be affected or changed by reason of their acquisition and administration by the United States as migratory-bird reservations, except so as far as the punishment of offenses against the United States is concerned.

Federal Eminent Domain
Sec. 32B

2. *To acquisition of land without cession of jurisdiction.* — Three acts which authorize land acquisition for purposes other than as sites for buildings specifical-

ly require state consent. Under the Weeks Forestry Act the Secretary of Agriculture may accept or approve no deed until the consent of the legislature of the state has been given to the acquisition for the purpose of preserving the navigability of navigable streams. Under the Migratory Bird Conservation Act the Secretary of Agriculture may accept no deed to land acquired unless the consent of the state is given by law. Under the Upper Mississippi River Wild Life & Fish Refuge Act the land may not be acquired until the consent of the legislature of the state to the acquisition in fulfillment of the purpose of the Act is had. The proviso as to purpose in two of the Acts seems to mean that if the land were diverted to some other purpose, the consent would be inoperative. In the Weeks Act and the Migratory Bird Conservation Act it is specifically provided that the states shall not lose their jurisdiction over the land acquired, and jurisdiction is consequently the same as if no state consent had been given, even when the property continues to be used for the purpose for which it was taken. Since it thus appears that the consent required by both of these Acts, unlike that required by Section 355 of the Revised Statutes prior to the 1940 amendment, is not for the purpose of vesting in the United States exclusive jurisdiction over the sites, such consent cannot be regarded as dispensed with by that amendment. Because the Upper Mississippi River Wild Life & Fish Refuge Act is so similar in nature to the Weeks Forestry and Migratory Bird Acts, it is probable that the consent provision embodied therein was likewise not designed to vest exclusive jurisdiction in the United States and therefore is also not dispensed with by the 1940 amendment.

CERTIFICATE OF SERVICE

I, Austin W. Lewis, attorney for Little Lake Misere Land Company, Inc., et al, and a member of the Bar of this Court, hereby certify that copies of the foregoing brief have been served in accordance with Supreme Court Rules, Rule 33, Paragraph 2(a), by depositing three copies of said brief in the United States mail, air mail postage prepaid, addressed to Erwin N. Griswold, Esq., Solicitor General, Department of Justice, Washington, D. C. 20530.

New Orleans, Louisiana, December ____, 1972.

AUSTIN W. LEWIS
Attorney of Record